LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
FEB 25 1952
CHARLES ELMORE CROPLEY
CLERK

No. 450

In the Supreme Court of the United States

OCTOBER TERM, 1951

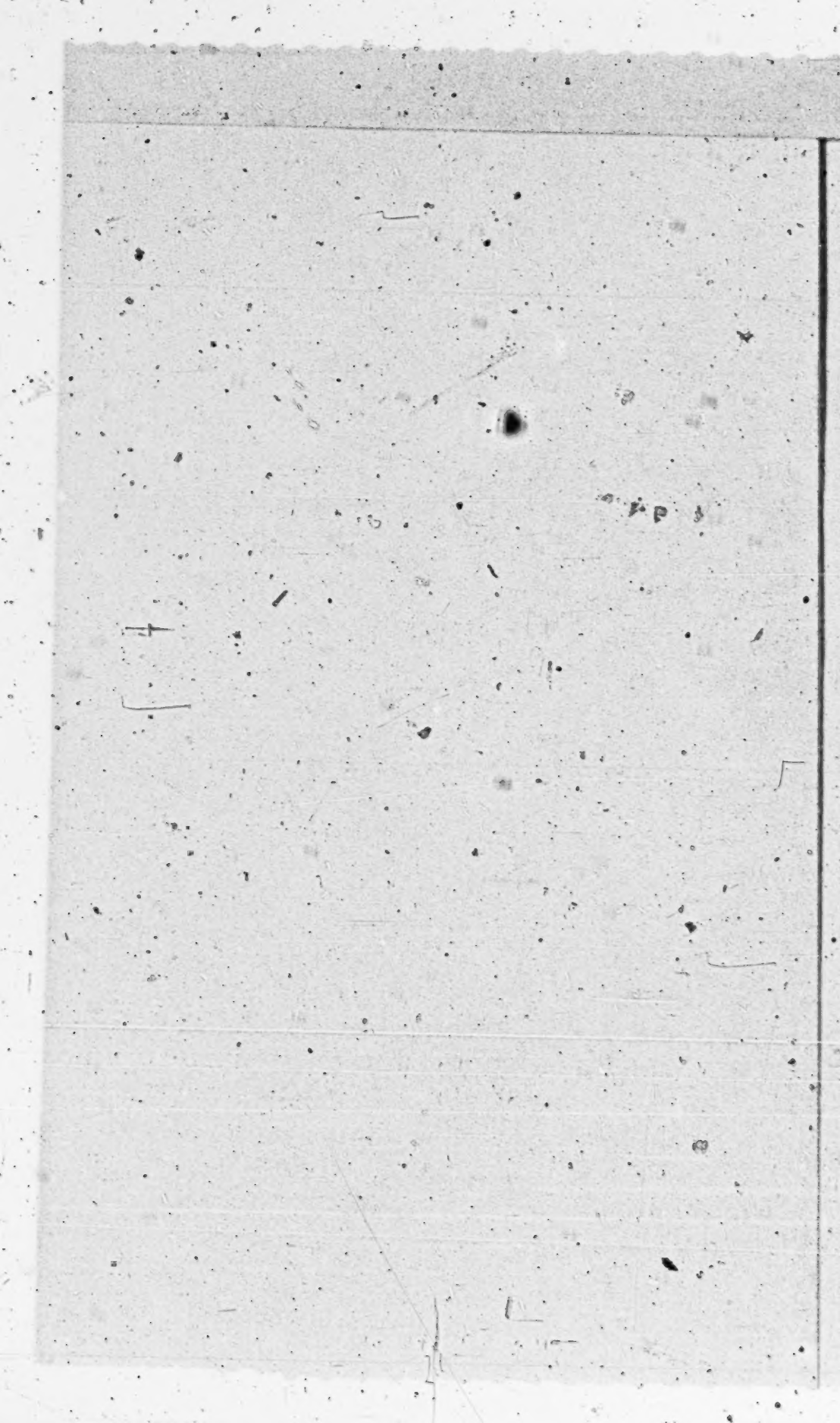
UNITED STATES OF AMERICA, PETITIONER

v.

ATLANTIC MUTUAL INSURANCE COMPANY, FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES



INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	3
Statement	3
Specification of errors to be urged	6
Argument:	
Introduction and summary	6
I. The statutory and decisional framework within which the "Both-to Blame" clause operates	11
A. The "Both-to-Blame" clause	11
B. The Harter Act	14
C. The Carriage of Goods by Sea Act	19
II. Neither Section 3(8) nor Section 4(3) of the Carriage of Goods by Sea Act prohibits the "Both-to-Blame" clause	23
III. The "Both-to-Blame" clause does not offend any applicable public policy; it is consistent with and implements the policy expressed in pertinent federal legislation	30
A. Since the Harter Act, no public policy requires that the carrier bear the loss or damage resulting to cargo from errors or faults of navigation	30
B. The statutes permit enforcement of contractual stipulations not inconsistent with their terms, including stipulations limiting cargo's preexisting rights	34
C. The "Both-to-Blame" clause is a reasonable means of implementing the congressional policy of relieving the carrier from liability to its cargo for errors and faults of navigation	40
Conclusion	45
Appendix	46

CITATIONS

Cases:

Aktieselskabet Cusco v. *The Sucarseco*, 294 U.S. 394, 12, 25, 37, 38

Allanwilde Transport Corp. v. *Vacuum Oil Co.*, 248 U.S. 377 38

Atlas, The 93 U.S. 302 ..... 7, 11, 12, 40, 41, 42, 43

Bamfield v. *Goole & Sheffield Transport Co.* [1910], 2 K.B. 94 26

Cases—Continued

	Page
Bank of California v. *International Mercantile Marine Co.*, 64 F. 2d 97, certiorari denied, 290 U.S. 649	38
Brass v. *Maitland*, 6 El. and Bl. 470, 119 Eng. Rep. 940	26
Calderon v. *Atlas Steamship Co.*, 170 U.S. 272	25
Carib Prince, The, 170 U.S. 655	39
Chattahoochee, The, 173 U.S. 540	7, 12, 13, 40, 41, 42, 43
Chicago, B. & Q. R. Co. v. *McGuire*, 219 U.S. 549	39
Compania La Flecha v. *Brauer*, 168 U.S. 104	33
Delaware, The, 161 U.S. 459	15
Floridian, The, 83 F. 2d 949, certiorari denied, 299 U.S. 577	39
Germanic, The, 124 Fed. 1	25
Great Lakes Transit Corp. v. *Interstate S. S. Corp.*, 301 U.S. 646	44
Great Northern Railway Co. v. *L.E.P. Transport and Depository Limited* [1922], 2 K.B. 742	26
Ikuno, K. v. *Morris & Co.*, 22 F. 2d 140, certiorari denied, 276 U.S. 626	38
Irrawaddy, The, 171 U.S. 187	9, 25, 33, 34-35
Isis, The (*May* v. *Hamburg Etc. Gesellschaft*), 290 U.S. 333	22
Jason, The, 225 U.S. 32	8, 9, 25, 33, 34, 35, 36, 37, 38
Knott v. *Botany Mills*, 179 U.S. 69	33
Liverpool Steam Co. v. *Phenix Insurance Co.*, 129 U.S. 397	14, 31
Luchenbach v. *McGahan Sugar Co.*, 248 U.S. 139	24
Macnamara & Son v. *"Hatteras,"* 33 Ll. L. Rep. 233 (Admiralty Division, Irish Free State)	25
May v. *Hamburg-Amerikanische Etc. Gesellschaft*, 290 U.S. 333	22, 33, 37
North Star, The, 106 U.S. 17	4, 11
Pacific-Atlantic S. S. Co. v. *Weyerhaeuser Timber Co.*, 304 U.S. 567	6
Phoenix Insurance Co. v. *Erie & Western Transportation Co.*, 117 U.S. 312	24
Prussia, The, 93 Fed. 837, certiorari denied, 174 U.S. 803	39
Railroad Co. v. *Pratt*, 22 Wall. 123	14
Railway Co. v. *Stevens*, 95 U.S. 655	14
Reid v. *Fargo*, 241 U.S. 544	38
Schooner Catherine, The v. *Dickinson*, 17 How. 170	11
St. Hubert, The, 107 Fed. 727, certiorari denied, 181 U.S. 621	38
Switzerland General Ins. Co. v. *Navigazione Libera Triestina*, 91 F. 2d 960	38
Turret Crown, The 297 Fed. 766, certiorari denied, 264 U.S. 591	24

Statutes:

	Page
Carriage of Goods by Sea Act of 1936 (Act of April 16, 1936, 49 Stat. 1207, 46 U.S.C. 1301, *et seq.*):	20
Section 1(a)	26
Section 3	21, 24, 48
Section 3(1)	21, 48
Section 3(2)	48
Section 3(3)	26, 48
Section 3(4)	49
Section 3(5)	26, 49
Section 3(6)	21, 50
Section 3(7)	26, 51
Section 3(8)	10, 21, 23, 24, 26, 32, 51
Section 4	52
Section 4(1)	52
Section 4(2)	39, 52
Section 4(2)(a)	12, 21, 24
Section 4(2)(i)	26
Section 4(2)(q)	21
Section 4(3)	10, 23, 25, 26, 27, 53
Section 4(4)	53
Section 4(5)	21, 26, 54
Section 4(6)	26, 54
Section 5	26
Section 6	26
Section 7	26
Section 9	26
Section 11	26
Section 13	20
Harter Act (Act of February 13, 1893, 27 Stat. 445, 46 U.S.C. 190-195):	14, 46
Section 1	15, 25, 46
Section 2	15, 46
Section 3	8, 11, 12, 16, 21, 33, 39, 47
Section 4	15, 47
Section 5	16
Brussels Convention of 1924 (Hague Rules), U. S. Treaty Series No. 931, 51 Stat. 233, ratified, 51 Stat. 246.	9, 19, 26

Miscellaneous:

1 Benedict, *Admiralty* (6th ed.), pp. 296-297	34
24 Cong. Rec.:	
pp. 147-149	15, 16
p. 1180	17
pp. 1291-2	17-18
Hearings, House Committee on Merchant Marine and Fisheries, on S. 1152, 74th Cong., 1st Sess.	20, 21, 27, 28

Miscellaneous—Continued

Page

Hearings, Senate Committee on Commerce, on S. 1152, 74th Cong., 1st Sess. 20, 26, 27, 28, 29
H. Rep. 1988, 52d Cong., 1st Sess. 15
H. Rep. No. 2218, 74th Cong., 2d Sess.:
pp. 1-3 ..... 20, 28
pp. 4-7 19
pp. 6-9 20
H. R. 9176, 52d Cong. 15
Knauth, *The American Law of Ocean Bills of Lading* (1947 ed.):
p. 87 5
pp. 107-111 15
p. 124 19
p. 176 11
S. Rep. No. 742, 74th Cong., 1st Sess., pp. 3-4 ..... 19, 20, 28
WSA, General Order 16, July 6, 1942, 7 F.R. 5246, as amended, 46 C.F.R. (Cum. Supp.) Sec. 306.11 5

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 450

UNITED STATES OF AMERICA, PETITIONER

v.

ATLANTIC MUTUAL INSURANCE COMPANY, FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court for the Southern District of New York (R. 101) is reported at 90 F. Supp. 836. The opinion of the Court of Appeals for the Second Circuit (R. 135) is reported at 191 F. 2d 370.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on August 31, 1951 (R. 148). The petition for a writ of certiorari was filed

on November 28, 1951. Certiorari was granted on January 14, 1952 (R. 151). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Carriage of Goods by Sea Act, and its predecessor the Harter Act, provide that an ocean carrier shall not be liable to its cargo for damage to cargo resulting from error or fault in the carrier's navigation. Under long-standing judicial decisions, however, where the damage results from a collision in which two vessels are both at fault, the cargo can recover 100% of its damages from the non-carrying vessel which in turn can recover 50% of that amount from the carrier. The effect of the two rules is that although the carrier, if solely at fault, is not liable to its cargo, where it is only partially at fault it is liable, indirectly, for half of the damages to its cargo. In order to avoid that result, it has become standard practice for ocean bills of lading to provide that, in the event of a collision resulting both from faulty navigation of the carrier and the fault of the other vessel, the cargo owner shall indemnify the carrier against such portion of its liability to the non-carrying vessel as represents damages payable to the carrier's cargo by the non-carrying vessel.

The question presented is whether this so-called "Both-to-Blame" clause is prohibited by, or contravenes the public policy expressed in, the Harter Act of 1893 and its successor the Carriage of Goods by Sea Act of 1936.

STATUTES INVOLVED

The pertinent portions of the Harter Act (Act of February 13, 1893, 27 Stat. 445, 46 U.S.C. 190-195) and of the Carriage of Goods by Sea Act (Act of April 16, 1936, 49 Stat. 1207, 46 U.S.C. 1301, *et seq.*) are set forth in the Appendix, *infra*, pp. 46-55.

STATEMENT

These are consolidated suits tried on stipulated facts. They arise out of a collision in 1942 in New York Harbor between the S. S. "Nathaniel Bacon", owned and operated by the United States,[1] and the M.V. "Esso Belgium", owned by Belgian Overseas Transports, S. A., a Belgian corporation (R. 28-29). Both vessels and the cargo aboard the "Nathaniel Bacon" sustained damage (R. 102).

The United States libelled the "Esso Belgium" to recover for the damage done the "Nathaniel Bacon" (R. 7). Certain insurance companies, as subrogees to the owners of cargo carried on the "Nathaniel Bacon", intervened as libellants to assert against the "Esso Belgium" a claim for damage or loss to such cargo (R. 17). A cross-libel was filed by the owners of the "Esso Belgium" to recover from the United States for the damage suffered by the "Esso Belgium" (R. 28), including any liability it might have incurred to the cargo

[1] The vessel was operated by the War Shipping Administration through an agency agreement; in thus operating the vessel, the War Shipping Administration was engaged as a common carrier in the commercial carriage of goods by sea for hire (R. 77).

of the "Nathaniel Bacon" (R. 35-36). The United States thereupon impleaded those cargo owners, seeking indemnity from them pursuant to the so-called "Both-to-Blame" clauses contained in the bills of lading issued to them (R. 40).

It was stipulated (R. 71-78) that the collision occurred through the negligence and faulty navigation of both vessels, and that no part of the loss sustained by any of the parties was the result of any fault or neglect of the shippers, consignees, owners, or insurers of cargo (R. 72). Seaworthiness of the "Nathaniel Bacon" and proper stowage of her cargo were stipulated (R. 72). It was further stipulated that the cargo owners were entitled to full recovery from the owners of the "Esso Belgium" (R. 75) and that the latter were entitled to recover part of the amount of those damages from the United States, as owner of the "Nathaniel Bacon" (R. 75).[2]

The only issue remaining was whether the United States could recover from the cargo owners the amount of the liability which it incurred to the "Esso Belgium" on account of damages paid by the latter to the cargo owners. It was undisputed that

[2] Where both vessels are to blame the American courts divide the damages equally. *The North Star*, 106 U.S. 17. On occasion, however, the parties, in an effort to settle some or all of the issues without the necessity of trial, stipulate for a different percentage, thus discounting the possibility that one vessel might be held solely at fault. In this case, by agreement among both vessels and the cargo of the "Nathaniel Bacon", the damages are to be borne two-thirds by the "Esso Belgium" and one-third by the "Nathaniel Bacon." (R. 119; see R. 80.)

Paragraph 9 of the bills of lading—the so-called "Both-to-Blame" clause—provides for such indemnity. That clause reads (R. 58) as follows:

> If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or Carrier.
>
> The foregoing provisions shall also apply where the owners, operators or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contract.[3]

---

[3] The clause was in the standard form prescribed by the War Shipping Administration. See WSA, General Order 16, July 6, 1942, 7 F.R. 5246, as amended, 46 C.F.R. (Cum. Supp.) Sec. 303.11. See also Knauth, *Ocean Bills of Lading* (1947 ed.), p. 87.

As the court below pointed out (R. 137, fn. 1): "This is the form of the 'Both-to-Blame' clause which has been in use in the North Atlantic Freight Conference since Sept. 1, 1937. Robinson, *Admiralty* 872, 873, 1939; Knauth, *Ocean Bills of Lading* 95, 136, 175, 3d Ed. 1947. An earlier form in use before the passage of the Carriage of Goods by Sea Act in 1936 (see Knauth, *op. cit. supra*, at 254) was upheld in the

The validity of the clause was thus put squarely in issue. The District Court (Judge Medina) held that the "Both-to-Blame" clause was not invalid as violative of Sections 3(8) or 4(3) of the Carriage of Goods by Sea Act (*infra*, pp. 51, 53), and that it did not contravene any public policy but rather implemented the policy proclaimed by that Act and the Harter Act (*infra*, p. 46). On appeal, the judgment of the District Court was reversed. The Court of Appeals (Judges Clark and Swan, Judge Augustus Hand dissenting), held that the "Both-to-Blame" clause was invalid because it violated public policy and was not expressly authorized by any statute or judicial decision.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the "Both-to-Blame" clause is contrary to public policy.

2. In failing to enforce the "Both-to-Blame" clause.

3. In failing to affirm the judgment of the District Court.

ARGUMENT

Introduction and Summary

The Harter Act and the Carriage of Goods by Sea Act make ocean carriers immune from liability

---

W. W. Bruce, D.C.E.D.N.Y., 14 F. Supp. 894; but on appeal the court found that seaworthiness of the vessel in all respects had not been proven, thus rendering it unnecessary to consider 'the much debated legal question as to the validity of the both-to-blame collision clause.' 2 Cir., 94 F. 2d 834, 837, certiorari denied *Pacific-Atlantic S. S. Co.* v. *Weyerhaeuser Timber Co.*, 304 U. S. 567."

to their cargo for damages resulting from fault in navigation. Where, however, the cargo is damaged as the result of a collision caused by the faulty navigation of the carrier and the fault of another vessel, the cargo can recover its full damages from the non-carrying vessel (*The Atlas*, 93 U.S. 302) which can in turn recover half of that amount from the carrier. *The Chattahoochee*, 173 U.S. 540. The effect of these statutory and judicial rules, taken together, is that where damage to cargo results from a collision caused solely by the carrier, the carrier is not liable, but where the damage is caused only in part by the carrier, it is indirectly liable for half the amount of the cargo damages. The result is obviously anomalous. The "Both-to-Blame" clause, customarily inserted in ocean bills of lading, is designed to avoid that anomaly by affording the carrier the same, but no greater, relief from responsibility to its cargo where partly at fault as it enjoys by express statutory provision where solely at fault. This it does by requiring cargo to repay to the carrier any amount which cargo has in effect recovered from its carrier as the result of the rules stated above.

The contractual provision embodied in the "Both-to-Blame" clause should be upheld unless prohibited by statute or contrary to public policy. We contend that the clause is not so prohibited; and that, far from being contrary to public policy, the clause is consistent with and supported by that policy as declared by Congress.

We believe that the majority in the Court of Appeals erred in at least three principal respects: First, it erred in considering the issue to be whether the courts should "fill in an asserted gap" inadvertently left by Congress in the legislative scheme (R. 137). This overlooks the fact that Congress, while establishing legislative uniformity as to the matters which it specified, did not attempt to prescribe all the provisions of a bill of lading. Within the framework which Congress established, the parties remain free to prescribe their mutual rights and liabilities. The court is not called upon to fill a legislative gap by prescribing the parties' rights and obligations, but simply to enforce a contract. Accordingly, our burden is not to persuade the Court that the statutes expressly authorize the indemnity here sought; it is only to persuade the Court that the problem is one on which the parties are free to contract. Cf. *The Jason*, 225 U.S. 32.

In the second place, we think the majority in the Court of Appeals misconceived the statutory policy. To establish that the "Both-to-Blame" clause was contrary to public policy, Judge Clark relied on decisions prior to the Harter Act which held that a carrier may not by contract avoid his liability for negligence. In thus relying on judicial notions of public policy, the court below failed, we believe, to give effect to the contrary policy declared by Congress. For in Section 3 of the Harter Act, Congress established the principle that if the shipowner had exercised due diligence to make a

vessel seaworthy and to man and equip her properly, and had fulfilled his duties of proper stowage and care of cargo, he had discharged all the obligations which it was reasonable to place upon him and should not be held liable for cargo damage or loss resulting from errors in navigation. That principle won international acceptance in the so-called Hague Rules, which were embodied in the Brussels convention of 1923, in our Carriage of Goods by Sea Act of 1936, and in similar legislation in all leading maritime nations.

This Court has often recognized the fundamental change in policy thus made by Congress, and has pointed to the duty of the courts "to conform in their decisions to the policy so declared." *The Irrawaddy,* 171 U.S. 187, 193; *The Jason, supra.* Pre-Harter Act decisions regarding negligence clauses are therefore wholly superseded, as to errors of navigation, by the statutory policy of immunity.

Finally, we believe the unwillingness of the court below to give full force to the legislative change in policy reflects another misconception as to the nature of the federal legislation. It seems to have treated that legislation as "remedial legislation" obtained by and enacted in the interest of shipowners; accordingly it was reluctant to sustain a contractual limitation of liability which Congress had not expressly authorized for fear lest "what is lost in the legislative halls may be granted by courts in the guise of 'interpretation'" (R. 137).

In fact, however, the shoe is on the other foot.

The impetus for the Harter Act came from American shippers, who sought to curb objectionable practices of British shipowners. And the Carriage of Goods by Sea Act was supported not alone by shipowners, but with at least equal vigor by shippers, cargo underwriters, bankers and other interests.

During the legislative consideration of the bill which became the Carriage of Goods by Sea Act, cargo underwriters proposed an amendment specifically outlawing the "Both-to-Blame" clause. The merits and legality of the clause were extensively argued, pro and con; the shipowners' representative emphatically stated that the proposed amendment was not part of the plan upon which divergent interests had all agreed and that if it were adopted the shipowners would withdraw their support and oppose passage of the bill. The proposed amendment was not adopted by either Committee and the bill was presented to Congress with the statement that it had the support of all interested parties. We believe this history completely dispels any possible inference from the lack of specific congressional authorization of the clause.

We shall in the first point of our brief sketch the function and effect of the "Both-to-Blame" clause and the situation to which it is addressed, and the underlying statutory framework of the Harter Act and the Carriage of Goods by Sea Act. We shall then show that neither § 3(8) nor § 4(3) of the Carriage of Goods by Sea Act, relied on by re-

spondents, forbids the clause expressly or by implication. Finally, we shall show that no consideration of public policy, as reflected in the statutes and in this Court's decisions, requires the "Both-to-Blame" clause to be struck down.

I

The Statutory and Decisional Framework Within Which the "Both-to-Blame" Clause Operates

A. *The "Both-to-Blame" Clause.*

The "Both-to-Blame" clause—which today is a standard provision of ocean bills of lading—can be properly appraised only as a natural outgrowth of the body of law regulating the liability of ocean carriers for negligent navigation in collision cases. The clause is of significance only under American law because the rule of law to which it responds does not exist in the law of other maritime nations.[4]

It was early established that in case of a collision in which both vessels were at fault, cargo could recover 100% of its damages from either vessel (*The Atlas*, 93 U.S. 302), and that, in such a collision, the total amount of the vessels' damages should be divided equally between them. *The Schooner Catherine* v. *Dickinson*, 17 How. 170; *The North Star*, 106 U.S. 17. In 1893, the Harter Act, by Section 3 (Appendix, *infra*,

---

[4] Other maritime nations have adopted the rule of the Collision Convention of 1910 under which cargo can recover from the noncarrying vessel only an amount proportionate to the degree of fault of that vessel. See Knauth, *The American Law of Ocean Bills of Lading* (1947 ed.), 176.

p. 47), provided that if the carrier had exercised "due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied," it was not to be liable to its cargo for damage resulting from negligent navigation. Section 4(2)(a) of the Carriage of Goods by Sea Act continues the immunity thus granted. Shortly after the enactment of the Harter Act, this Court, in *The Chattahoochee,* 173 U.S. 540, reaffirmed the divided damages rule and held further that a noncarrying vessel could recover from the carrier, as part of its damages, one-half of the amount of damages it had paid to the carrier's cargo. See also *Aktieselskabet Cuzco* v. *The Sucarseco,* 294 U.S. 394.

After the decision in *The Chattahoochee,* therefore, the award of damages to cargo in cases of collision resulting from negligent navigation of one or both vessels has been as follows (the "Both-to-Blame" clause aside):

1. Where the carrying ship is solely at fault: The cargo recovers nothing. Section 3 of the Harter Act, *infra,* p. 47.

2. Where the noncarrying vessel is solely at fault: The cargo recovers 100% of its damages from that vessel. *The Atlas,* 93 U.S. 302.

3. Where both vessels are at fault: The cargo recovers 100% of its damages from the noncarrier which in turn recovers 50% of that amount from

the carrier. *The Chattahoochee, supra.*[5] Thus, in effect, each vessel is made responsible for 50% of the amount of the damages suffered by cargo.

The anomalous result is thus obtained that while a carrier, in the event of a collision in which it was wholly at fault, pays its cargo nothing, yet in the event of a collision in which it was only partly at fault, it is required to bear 50% of its cargo's damage.

It was, as the District Court pointed out (R. 103), in response to this anomaly that the "Both-to-Blame" clause was inserted in ocean bills of lading. If the "Both-to-Blame" clause is given effect, the result where one vessel is wholly at fault is not changed. (See cases 1 and 2 above). Where, however, both vessels are at fault, as in case 3 above, the cargo recovers 100% of its damages from the non-carrier which in turn recovers 50% of that amount from the carrier. The carrier, however, then recoups from cargo, pursuant to the clause,

---

[5] It should be noted that "recover" is used loosely here to describe the effect of *The Chattahoochee* decision. Under that decision, the non-carrier is allowed to include in its damages the amount of damages paid to cargo. Since each vessel is liable for one-half the total amount of damages to both vessels, the result in a particular case may be that there is no actual "recovery" by the noncarrier. The effect in all cases, however, is to diminish the amount due from, or increase the amount due to, the noncarrier by 50% of the amount of damage to cargo.

As the present case illustrates (*supra*, p. 4), the damages may by stipulation be divided on some basis other than 50-50. Such a different division of damages between the two vessels involved does not affect the principle or practical effect of the "Both-to-Blame" clause.

the amount paid to the noncarrier on account of damage to cargo. The only effect of the clause is thus to give the carrier the same (but no greater) immunity in a mutual fault situation as it has by statute where it is solely at fault, while in no way interfering with cargo's recovery and retention of that portion of the damages for which the noncarrier is ultimately responsible.

B. *The Harter Act*

The Harter Act, enacted in 1893 (27 Stat. 445, 46 U.S.C. 190-195; *infra*, p. 46) was the first effort by Congress to prescribe to some extent the respective rights and liabilities of shipper and carrier. Prior to its enactment that relationship was governed by contract and decisional law. Shipowners, particularly British shipowners, customarily included in bills of lading a large number of provisions exonerating them from liability in various circumstances. Such provisions were generally upheld by the British courts. The American courts, however, applied to carriers by sea, as to all carriers, the rule of liability for all damages attributable to the fault or neglect of the carrier or its agents, and repeatedly struck down, as contrary to public policy, contractual provisions limiting the carrier's liability for such damages. E.g., *Liverpool Steam Co.* v. *Phenix Insurance Co.*, 129 U.S. 397; *Railway Co.* v. *Stevens*, 95 U.S. 655; *Railroad Co.* v. *Pratt*, 22 Wall. 123.

The Harter Act was sought by American shippers. The bill, H.R. 9176, 52d Cong., was introduced in the House of Representatives for the avowed purposes of affirming the judicially developed restraints on contractual limitation of carriers' liability, and of making those restraints effective in cases where bills of lading issued abroad by foreign carriers would otherwise not be subject to our laws. Specifically, the complaint was that British carriers, who had a virtual monopoly of the ocean trade between the United States and foreign ports, were, by virtue of their monopoly position, forcing American shippers to acquiesce in limitations of liability which, in fact, denuded shippers of any protection. See H. Rep. 1988, 52d Cong., 1st sess.; 24 Cong. Rec. 147-149.[6]

To this end, Sections 1 and 2 of the Act (*infra*, pp. 46-47) declared null and void any provision of a bill of lading (1) relieving the carrier of liability for negligence, fault or failure in loading, stowage, custody, care, or delivery of freight, or (2) lessening, weakening, or avoiding the shipowner's obligation to exercise due diligence in equipping, manning, provisioning, and outfitting the vessel and making it seaworthy. These prohibitions were made applicable to any vessel transporting merchandise or property from or between ports of the United States and foreign ports. Section 4

[6] "The exigencies which led to the passage of the act" are discussed in *The Delaware*, 161 U. S. 459, 472. See also Knauth, *Ocean Bills of Lading* (1947 ed.), pp. 107-111.

required the owner, master, or agent to issue a bill of lading containing certain prescribed information and made that document prima facie evidence of the receipt of the goods described in it. By Section 5 the agent, owner, or master of a vessel guilty of violating any provision of the Act was made liable to a fine not exceeding $2,000; the fine was a lien on the vessel for which it could be libelled in any district court within whose jurisdiction it was found.

In imposing these obligations on carriers, Congress also, in Section 3 of the Act, relieved the carrier of liability for faults of navigation. As introduced, Section 3 provided only that shipowners should not be liable for "error of judgment in navigation * * * if navigated with ordinary skill and care."[7] In the Senate, however, Section

[7] The entire text of Section 3, as introduced, is as follows:

SEC. 3. That if any vessel transporting merchandise or property between ports in the United States of America and foreign ports shall, on starting on her voyage, be in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or master shall become or be held responsible for damage or loss resulting from error of judgment in navigation or in the management of said vessel, if navigated with ordinary skill and care, from the time of her leaving her usual place of loading on her intended voyage until her arrival at the usual place of discharge at her port of delivery, nor shall the owner or owners, the vessel, or master be held liable for losses arising from dangers of the sea, acts of God, or public enemies, or in saving life, and it may be stipulated in bills of lading and shipping receipts that the vessel may render services to property in distress afloat and tow same to the nearest and most convenient port of safety without incurring penalties from deviation in rendering such service. [24 Cong. Rec. 147.]

3 was drastically amended to read as it was finally enacted. As changed, it provided, as we have shown above, that carriers, if they had exercised due diligence to make the vessel seaworthy, were not to be liable to their cargo for damage resulting from negligent navigation. The reasons for the Senate change were thus explained to the House by Mr. Lind, who was in charge of the bill:[a]

> Mr. LIND. One important new feature is presented by the Senate amendments. As the law now stands American vessels are subjected to certain hardships, from which they can not exempt themselves by contract or otherwise, to which foreign vessels are not subjected. A foreign vessel, of course, can contract with a shipper, and make provision against any liability on its own part for the negligence of its masters or owners; but the object of this bill is to limit this right. An American vessel can not make any such contract, or absolve itself from any such liability, for the reason that it is always amenable to the Federal courts, and the Federal courts have always held that contracts of that character are again public policy.
>
> Those who are more familiar with the matter of ocean navigation than I—especially the gentleman from Maine [Mr. DINGLEY]—have agreed with me, as it was well demonstrated in the Senate committee at the hearings which I

[a] The Senate Committee made no written report on the bill and the debates in the Senate do not discuss the reason for the change. Extensive hearings were held on the bill by the Senate committee (see 24 Cong. Rec. 1180) but apparently no transcript was kept.

attended, that the law as applicable to shipping in the United States ought to be somewhat more liberal than it is at present. Now, after a master, owner, or charterer has taken every precaution that human ingenuity can suggest in equipping, manning, and in furnishing his vessel, nevertheless, if out on the high seas in stress of weather or in storms, when every man is worn out with watching, if a man falls asleep on the watch or commits any fault of navigation whereby injury results, the master, owner, or charterer is held responsible under the law.

To this extent the bill relieves domestic shipping from these burdens. It provides that when the owner or owners, the charterers or the master have exercised due diligence in properly equipping, manning, and stowing, making the vessel in all respects seaworthy—

Mr. DINGLEY. And properly navigating.

Mr. LIND. And properly navigating, then they shall not be liable for faults or errors of navigation solely. [24 Cong. Rec. 1291-2, 52d Cong., 2d Sess.]

Congress thus recognized that however diligent the shipowner might be in preparing the vessel for the voyage, once the vessel has left shore vessel and cargo are inevitably exposed to common perils beyond the direct control of either shipowner or cargo. It regarded errors and faults of navigation as one of those inevitable perils inherent in the nature of ocean shipping, doubtless recognizing that to require the carrier to bear the loss resulting

from such errors would not reduce the likelihood of loss but would merely cause this element of transportation cost to be reflected in higher freight rates.

Thus Congress established, in the Harter Act, a broad scheme for the division of risks between cargo and carrier. On the one hand it defined certain essential duties to which it felt shipowners should be subject; it forbade avoidance of those duties by contract and it sought to make that prohibition effective against foreign shipowners. On the other hand Congress, having in mind the peculiar nature of ocean commerce and the need to encourage investment in shipping, determined to relieve carriers of liability for errors or faults of navigation.

C. *The Carriage of Goods by Sea Act.*

This scheme of division of risks first embodied in the Harter Act won international acceptance in the so-called "Hague Rules" which were drafted at a meeting of the International Law Association in August 1921 and (with minor changes) became the Brussels Convention of 1924, signed by 24 nations, including the United States. Ratification of the Convention was advised and consented to by the Senate in April, 1935, but was not deposited until June 25, 1937. 51 Stat. 233; See H. Rep. No. 2218, 74th Cong., 2d sess., pp. 4-7; S. Rep. 742, 74th Cong., 1st sess., p. 4; Knauth, *Ocean Bills of Lading* (1947 ed.), p. 124. Meanwhile Congress, effec-

tive July 15, 1936, enacted the provisions of the Convention, with certain modifications not here material,[9] as the Carriage of Goods by Sea Act, 49 Stat. 1207, 46 U.S.C. 1301, *et seq.*[10]

The Carriage of Goods by Sea Act was the product of conferences held by the various interests primarily affected who agreed to resolve past disputes by supporting a bill embodying the rules of the Convention. The bill accordingly had the support of carriers, shippers, cargo underwriters, bankers and the admiralty bar. S. Rep. 742, 74th Cong., 1st sess., pp. 3-4; H. Rep. 2218, 74th Cong., 2d sess., pp. 1-3; Hearings before the Senate Committee on Commerce on S. 1152, 74th Cong., 1st sess. (herein referred to as Senate Hearings); Hearings before House Committee on Merchant Marine and Fisheries on S. 1152, 74th Cong., 2d sess. (herein referred to as House Hearings). The Act particularized, in greater detail than the Harter Act, numerous rights and liabilities of carriers and shippers and made a number of significant changes in prior law. These changes are summarized in the House Report at pages 6-9, which concludes: "it will be

---

[9] The Convention was ratified with the understanding that in the event of conflict the provisions of the Carriage of Goods by Sea Act would prevail. 51 Stat. 246.

[10] The Carriage of Goods by Sea Act supersedes the Harter Act as to bills of lading in foreign commerce. The Harter Act remains in effect as to bills of lading in domestic commerce, except where the bill of lading declares that it is subject to the Carriage of Goods by Sea Act. (Sec. 13.) The present bills of lading so declared (R. 52).

obvious why the demand of cargo owners is so universal that the bill be enacted into law" (p. 9).[11]

The new act made no change, however, in the basic scheme of the Harter Act as outlined above. It continued, and strengthened, the shipowners' obligations of seaworthiness, proper manning, outfitting and proper care and stowage of cargo, and the prohibition against contracting out of these obligations. (Sec. 3). It also reiterated and strengthened the carriers' immunity from liabilty for faults and errors of navigation established by Section 3 of the Harter Act. Section 4(2)(a) (*infra*, Appendix, p. 52) provides:

> Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—
>
> (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

The language of that section grants the same immunity from liability afforded by Section 3 of the

---

[11] Principal among them, in addition to that discussed in the text immediately below, were: (a) A provision (Section 4(5)) prohibiting the carrier from limiting his liability below $500 per package or customary freight unit. Under prior law there had been no restriction on such limitations. (b) A provision (Section 3(6)) allowing cargo owners one year within which to bring suit. Under prior law, shorter time limitations in bills of lading had been sustained (see p. 38, *infra*). (c) Elimination of various "exception clauses" relieving the carrier of liability (Section 3(1) and (8)) and placing on the carrier the burden of proof that loss or damage was not due to his fault or neglect. (Section 4(2)(q).)

All of the foregoing had long been sought by cargo interests. (*E.g.*, House Hearings, p. 41.)

Harter Act but, by eliminating the condition that due diligence have been exercised to make the ship seaworthy in all respects, whether or not causally related to the damage, the Carriage of Goods by Sea Act made the immunity unconditionally available to the carrier.[12]

Thus both statutes proclaim a policy of distributing the various risks of transportation, as between carrier and cargo, in accordance with a uniform statutory scheme under which the risk of cargo damage caused by errors and faults in navigation is to be borne by cargo rather than by carrier. The "Both-to-Blame" clause conforms to and implements this policy by effecting precisely the same distribution of loss between carrier and cargo where the carrier is only partly at fault, as that decreed by Congress where the carrier is solely at fault. It applies only in circumstances in which the statutes declare that the carrier shall not "become or be held responsible for any damage or loss" and can never be invoked against losses which the statutes require the carrier to bear.

---

[12] The consequence of this change was to remove the effect of this Court's decision in *The Isis* (*May* v. *Hamburg-Amerikanische Etc. Gesellschaft*), 290 U.S. 333, which held that the failure of the carrier to make the ship seaworthy in all respects barred resort to the immunity from liability for negligent navigation even where the unseaworthiness did not contribute in any way to the damage done.

II

Neither Section 3(8) Nor Section 4(3) of the Carriage of Goods by Sea Act Prohibits the "Both-to-Blame" Clause

Respondents' contention that the "Both-to-Blame" clause is directly prohibited by either Section 3(8) or Section 4(3) of the Carriage of Goods by Sea Act was rejected by the District Court (R. 106-108) and not passed on by the Court of Appeals (R. 146 and footnote 9 at R. 145-146). We think the lack of merit of that contention is apparent on the face of the two provisions relied on. And even if the text of those provisions could bear the construction placed upon it by respondents, such a construction would be clearly negated by the fact that Congress rejected a proposed amendment designed to outlaw the clause explicitly.

Section 3(8) provides:

> Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

This provision forbids contracting out of certain specified duties and obligations only, *i.e.*, those

"provided in this section [Section 3]". It is only "negligence", "fault", or "failure" in respect of those specified duties which the statute forbids the carrier to avoid by contract. Section 3 imposes no duties respecting errors or faults of navigation; these are dealt with in Section 4(2)(a) which expressly relieves the carrier from liability for such errors or faults. Since the "Both-to-Blame" clause does not apply unless the only fault of the carrier consists in an "act, neglect or default * * * in the navigation or in the management of the ship" (p. 5, *supra*), the prohibition in Section 3(8) is wholly inapplicable to that clause.[13]

There is no support for respondents' argument that "negligence" is to be read, without regard to the context of the section, as a prohibition of contracts relieving from liability for negligence generally. Section 1 of the Harter Act, which similarly denied validity to contracts relieving from liability arising from "negligence, fault, or failure in" specified duties, has been consistently construed as

---

[13] The second sentence of Section 3(8), relating to benefit of insurance clauses, was aimed, as its text indicates, at a device by which shipowners, once they satisfied their liability to cargo, became subrogated to the cargo's claim against its insurer. Benefit of insurance clauses, although held valid even before the enactment of the Harter Act (*Phoenix Insurance Co.* v. *Erie & Western Transportation Co.*, 117 U.S. 312), had been the subject of a protracted legal battle between shipowners and cargo insurers, since their effect was to shift the entire burden of risk to the insurers who would normally have been subrogated to cargo's cause of action against the shipowner. *Cf. Luckenbach* v. *McCahan Sugar Co.*, 248 U.S. 139; *The Turret Crown*, 297 Fed. 766 (C.A. 2), certiorari denied, 264 U.S. 591.

The benefit of insurance provision of Section 3(8) is plainly restricted, as is all of Section 3(8), to attempts by carriers to limit those liabilities established by the rest of Section 3.

relating only to "negligence in respect to those duties." *The Jason*, 225 U.S. 32, 50-51; see also *Calderon* v. *Atlas Steamship Co.*, 170 U.S. 272, 277-278; *The Irrawaddy*, 171 U.S. 187, 190; *Aktieselskabet Cuzco* v. *The Sucareseco*, 294 U.S. 394, 402; *The Germanic*, 124 Fed. 1, 2-3 (C.A. 2).[14]

Section 4(3) provides:

> The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

This provision also clearly has no relevance to the problem to which the "Both-to-Blame" clause is addressed. It is concerned with the location of responsibility for "loss or damage sustained by the carrier or the ship". The "Both-to-Blame" clause, on the other hand, is concerned with the location of responsibility for loss or damage sustained by the cargo. It enables the carrier to recoup amounts otherwise chargeable to it on account of "loss of, or damage to, or any claim whatsoever of the owners of said goods" (*supra*, p. 5). Although necessarily cast in the form of an indemnity because of the indirect method by which the carrier is otherwise made to respond for cargo damage, its effect is

---

[14] See also *Macnamara & Son* v. *"Hatteras,"* 33 Ll. L. Rep. 233, 234 (Admiralty Division, Irish Free State), referring to "* * * the restrictions, *viz.*, 'in proper loading,' 'stowage,' etc., in Section 1 of the Harter Act—reading, as I do, the words 'in proper loading, stowage,' etc., as modifying 'negligence' and 'fault' as well as 'failure.'" The court reiterated that "in Section 1 the negligence spoken of is limited to negligence 'in proper loading, stowage,' * * *".

limited to relieving the carrier from responsibility for damage to its cargo from those risks (errors in navigation or management) as to which the statutes declare a policy of immunity.[15]

Neither Section 3(8) nor Section 4(3) can conceivably be thought to have been directed against the "Both-to-Blame" clause since both sections were originally drafted long before the clause came into use.[16] During the hearings on the Car-

---

[15] The evident purpose for which Section 4(3) was inserted in the Hague Rules (see pp. 19-20, *supra*, and n. 16, *infra*) was to protect the shipper from any liability to the carrier or the ship for damage caused by goods shipped, which might be imposed under national law, beyond that imposed by Section 4(6) (relating to inflammable explosive or dangerous cargo). British courts had held the shipper liable as under an implied warranty that goods tendered to a common carrier were fit for carriage by such carrier. Lord Campbell, C.J., in *Brass* v. *Maitland*, 6 El. and Bl. 470, 119 Eng. Rep. 940; *Bamfield* v. *Goole & Sheffield Transport Co.*, [1910] 2 K.B. 94, 113; *Great Northern Railway Co.* v. *L. E. P. Transport and Depository Limited*, [1922] 2 K.B. 742, 758.

That the clause was limited to this purpose is indicated by its reference exclusively to the "shipper"—who would be held liable on such a warranty. On the other hand, questions of damage or loss to cargo are the concern of the owner of the cargo; it is the owner who recovers from the noncarrying vessel and it is from the owner that the "Both-to-Blame" clause authorizes recoupment. The draftsmen of the Hague Rules and the Carriage of Goods by Sea Act carefully distinguished between the shipper and the owner of the cargo. Thus Section 3(5) of the Act distinguishes between the rights of "the shipper" and those of "any person [party to the contract of carriage] other than the shipper." And where the owner is meant to be included, the Act, as in Section 4(2)(i), speaks of "the shipper or owner of the goods." Section 1(a), 3(3)(a) and (b), 3(5), 3(7), 4(2)(i), 4(5), 4(6), 5, 6, 7, 9 and 11 all use the word "shipper" where the context shows that only the shipper is meant.

[16] Both sections were taken verbatim from the identically numbered sections of the Brussels Convention of 1924. U.S. Treaty Series No. 931, 51 Stat. 233. The "Both-to-Blame" clause did not come into use until about 1934. See Senate Hearings, *supra*, p. 52.

riage of Goods by Sea Act, cargo underwriters evidently recognized the inadequacy of these provisions to invalidate the clause. At the Senate hearings, Mr. Roger Englar, on behalf of the American Institute of Marine Underwriters, proposed the following amendment to Section 4(3) for the avowed and sole purpose of outlawing the "Both-to-Blame" clause (matter to be added shown in italics):

> The shipper *or owner of the goods* shall not be responsible for loss or damage sustained, *or liability therefor incurred,* by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants. *Any clause or stipulation which seeks to impose liability contrary to the foregoing shall be null and void, including any clause or stipulation requiring the owner of cargo to indemnify the ship or carrier against liability to a colliding vessel for any part of the collision damages paid or payable by such colliding vessel.* [Senate Hearings, p. 54.]

The same amendment was proposed to the House Committee, House Hearings, p. 49.

At both hearings, a representative of the American Steamship Owners' Association strenuously objected to the proposed amendment as changing the existing law (Senate Hearings, pp. 61-63, House Hearings, pp. 53-59). He stated emphatically that the proposed amendment made such a major change in the bill that, if it were

adopted, the Steamship Owners' Association would withdraw its support and oppose the bill. (Senate Hearings, p. 61; House Hearings, p. 54). Other witnesses objected to the proposed amendment as injecting controversy on a measure on which all interests had theretofore been in agreement,[17] and as unduly weighting the bill in favor of the shippers.[18]

The validity and reasonableness of the clause, and the effect on it of the bill as it then stood, were discussed at considerable length before each committee, substantially the same arguments being made as have been made here. Neither committee adopted the proposed amendment, and the bill was submitted to both Houses of Congress with the statement that all interests concerned supported it. H. Rep. No. 2218, 74th Cong., 2d sess., pp. 1-3; S. Rep. No. 742, 74th Cong., 1st sess., pp. 3-4.

In the face of this action it cannot well be argued

---

[17] See testimony of Charles S. Haight, Chairman, Bills of Lading Committee, International Chamber of Commerce, House Hearings, 66-74; Arnold W. Knauth, Secretary of Maritime Law Association of the United States, House Hearings, 87-88; cf. letter of A. B. Barber, Vice-Chairman, Conference on Uniform Ocean Bills of Lading, House Hearings, Part 2, p. 142.

Significantly, no shipper spoke in behalf of the amendment proposed by cargo underwriters; a representative of the American Cotton Shippers Association stated (House Hearings, 97):

> Of course, the note that has been introduced here this morning shows a discordant note. We do not feel, however, even if that should turn out to be so bad as our underwriter representative states, it would have the effect of really increasing the insurance cost.

[18] See testimony of Charles S. Haight, cited, *supra*, n. 17.

that Congress prohibited the clause. The fact is that when squarely faced with the problem, Congress refused to prohibit it. Nor can such refusal be explained on any theory (conjectural at best) that the amendment was deemed unnecessary. While its proponents, out of normal caution, usually described it as a clarifying amendment they also on one occasion candidly admitted that

> the rules in their present form, and that the bill 1152 in its present form, does not invalidate this objectionable clause [Senate Hearings, p. 55].

They further stated that if the proposed amendment were rejected, they reserved "the privilege of coming around to your committee in other connections and urging relief from that clause" (*id.* p. 56).[19] And its opponents objected to it not as unnecessary, but as a major departure from the bill which had been agreed upon by all interested parties. In these circumstances, to hold that Con-

---

[19] Mr. Englar stated (*ibid.*):

> I want to say to you, Mr. Chairman, since you have indicated you are here rather in the capacity of a recorder or observer, if this matter is not taken care of in the bill 1152, I want it understood we reserve the privilege of coming around to your committee in other connections and urging relief from that clause.
>
> It does not have to be done under the Hague rules I can see, but I do not want it understood we accept the Hague rules as final disposition of our rights. We would like to have it taken care of, and if it cannot be taken care of here, we will not go on record as opposing the rules.

gress, having refused to outlaw the Both-to-Blame clause when that question was specifically before it, nevertheless intended to outlaw the clause by the provisions it did enact, would fly in the face of the Court of Appeals' admonition (R. 137) that—

> care must be taken lest what is lost in the legislative halls be granted by courts in the guise of "interpretation".

III

The "Both-to-Blame" Clause Does Not Offend Any Applicable Public Policy; It Is Consistent With and Implements the Policy Expressed in Pertinent Federal Legislation

A. *Since the Harter Act, no public policy requires that the carrier bear the loss or damage resulting to cargo from errors or faults of navigation.*

Since nothing in the Carriage of Goods by Sea Act can be read as directly prohibiting the enforcement of a "Both-to-Blame" clause, and since Congress refused to enact a specific prohibition of the clause, the question before this Court is whether such a prohibition can be implied either from the overall scheme of the Act or from some other source of public policy. Ordinarily, contractual provisions are enforced unless there is some valid reason to deny enforcement. Hence, the burden is on respondents to find some compelling reason for refusing to enforce a provision which is part of the con-

tract of carriage and on the basis of which freight and insurance rates were set.[20]

The court below rested its decision in large part on the view that the "Both-to-Blame" clause offended a public policy against permitting a carrier to relieve itself from liability for negligence. Prior to the Harter Act, a carrier was liable for errors and faults of navigation to the same extent as for lack of diligence in outfitting and rendering seaworthy, etc., and any provision by which it attempted to contract away that liability was denied enforcement as violative of public policy. These decisions were rested on the principle that a carrier cannot, by contract, avoid "the essential duties of [its] employment." *Liverpool Steam Co.* v. *Phenix Insurance Co.*, 129 U. S. 397, 441.

---

[20] The court below attributed great weight to an asserted inequality of bargaining power between shippers and carriers. We do not believe that such shippers as Standard Food Products Corp., Park & Tilford Import Corp., P. Lorillard Co., Inc., Westinghouse Electric Int'l Co., Canada Dry Ginger Ale, Inc., American Spirits Inc., McKesson & Robbins, Inc., Nash-Kelvinator Co., and R. C. A. Mfg. Co. (R. 44-45), are quite so helpless as the court below would suggest. But, in any event, such an inequality of bargaining power, if it exists, does not deprive the bill of lading of force as a contract, or deny enforceability to bill of lading clauses which are otherwise reasonable. If it did, the courts would, on a parity of reasoning with that of the court below, have denied enforcement to the *Jason* clause, discussed *infra*, pp. 34-38, and to all of the clauses cited at pp. 38-39, *infra*.

The Harter Act, however, made a deliberate change in policy. While reaffirming legislatively the rule that a carrier cannot contract out of any of his essential duties, it declared, contrary to the earlier cases, that the carrier should not be liable to cargo for damage resulting from errors and faults of navigation. It thus redefined the essential duties of the carrier to its cargo, treating errors and faults of navigation, not as a breach of an essential duty, but as an inevitable risk of marine transport which was to be borne by the party on whom the damage fell and was not to give rise to legal liability as between carrier and cargo. In accordance with this basic division of risks, Congress substituted, for the former judicial rules, a legislative specification of the duties from which a carrier could not relieve itself by contract. These duties to cargo included the obligations of seaworthiness, proper outfitting and manning, and proper stowage and care of cargo. They did not include any duty to cargo regarding errors and faults of navigation.

The policy thus embodied in the Harter Act has been a fundamental part of our maritime law for nearly 60 years, and has become the basis of an international agreement to which most maritime nations are parties. That policy was reaffirmed as recently as 1936 in the Carriage of Goods by Sea Act. The later Act likewise specifies the duties from which the carrier may not relieve itself by contract. Section 3(8), discussed *supra,* pp. 23-25.

Those duties do not include a duty to avoid errors and faults of navigation. In both statutes these are the subject of an express immunity.

This Court has frequently referred to the basic change in policy made by the Harter Act. *Compania La Flecha* v. *Brauer*, 168 U.S. 104, 117; *Knott* v. *Botany Mills*, 179 U.S. 69, 71; *The Irrawaddy*, 171 U.S. 187, 193; *The Jason*, 225 U.S. 32, 49; *May* v. *Hamburg-Amerikanische, Etc.*, 290 U.S. 333, 342-343. As this Court said in *May* v. *Hamburg-Amerikanische, Etc., supra:*

> Until the enactment of the Harter Act * * * a shipowner was not at liberty by any contract with the shipper to rid himself of liability to the owners of the cargo for damages resulting from the negligence of the master or the crew [citing cases]. Section 3 of the Harter Act was the grant of a new immunity. Neither the vessel nor her owner was to be liable thereafter for damage or loss resulting from faults or errors in navigation or in the management, if the owner had complied with a prescribed condition.[21]

Similarly, in *The Irrawaddy, supra,* the Court said:

> Although the foundation of the rule that forbade ship owners to contract for exemption from liability for negligence in their agents and employees, was in the decisions of the courts

[21] The Court went on to hold that the condition—rendering the vessel seaworthy in all respects—had not been complied with. By the Carriage of Goods by Sea Act, the condition was removed and the immunity rendered unconditional. See p. 22, *supra.*

that such contracts were against public policy, it was nevertheless competent for Congress to make a change in the standard of duty, and it is plainly the duty of the courts to conform in their decisions to the policy so declared.

B. *The statutes permit enforcement of contractual stipulations not inconsistent with their terms, including stipulations limiting cargo's pre-existing rights.*

The effect which should be given to this legislative change in policy is most clearly demonstrated by *The Jason*, 225 U.S. 32, 49. That case demonstrates that in view of the immunity from liability for negligent navigation conferred by the Harter and Carriage of Goods by Sea Acts, it is now competent for carriers to contract in a manner consistent with this policy even in respects which would not have been permitted before the enactment of those acts.

The Jason involved a question of general average.[22] Under the established principles of general average, a party is denied contribution to general average from parties benefited by a sacrifice "if the danger, to avert which the sacrifice was made, has arisen from the fault of the claimant." *The Ir-*

---

[22] The doctrine of general average is thus described in 1 Benedict, *Admiralty* (6th ed), pp. 296-297:

> When, in peril of shipwreck, a sacrifice is made of a portion of the property thus exposed, to save the residue, every person whose property is saved is liable to contribute, in proportion to his goods saved, to make up the loss of those whose goods have been sacrificed for the common benefit. This is called a general average, or an average contribution.

rawaddy, 171 U.S. 187, 189. Thus, before the Harter Act, the carrier could not have enforced a contract requiring cargo to contribute to its sacrifices made to avert a common peril arising from the carrier's error of navigation, because such contribution would to that extent have relieved the carrier from the consequences of its servants' negligence.

In *The Irrawaddy*, this Court held that the Harter Act did not of its own force change the applicable law of general average. But in *The Jason*, this Court recognized the essential distinction, which we think the court below ignored, between the function of courts when they are asked to declare the rights of parties as created by statute and their function when asked to invalidate a private consensual agreement as contravening the policy of that statute. It held that the Harter Act did make it competent for the parties by contract to provide for general average contribution in such a situation. The Court said, at pp. 55-56:

> In our opinion, so far as the Harter Act has relieved the shipowner from responsibility for the negligence of his master and crew, it is no longer against the policy of the law for him to contract with the cargo-owners for a participation in general average contribution growing out of such negligence; and since the clause contained in the bills of lading of the *Jason's* cargo admits the shipowner to share in the general average only under circumstances where by the act he is relieved from responsibility,

> the provision in question is valid and entitles him to contribution under the circumstances stated.

The principles announced and applied in *The Jason* are precisely applicable here. The effect of the previously existing law, to which the *Jason* clause was addressed, was to require the carrier to bear the entire burden of its sacrifices to save the venture from peril, notwithstanding the fact that those sacrifices also benefited cargo and would, but for the errors and faults of navigation, have been shared by cargo under the principles of general average. The decision in *The Jason* held that "under circumstances where by the act [the carrier] is relieved from responsibility," it could by contract require cargo to bear its share of such sacrifices. The "Both-to-Blame" clause, like the *Jason* clause, is applicable only in situations where the acts relieve the carrier from responsibility. Like the *Jason* clause, it operates to make a statutory immunity effective in a situation where, because the responsibility arose indirectly, the Harter and Carriage of Goods by Sea Acts did not of their own force operate to remove it.

This Court thus rejected the view that "direct authorization" is essential to the validity of a bill of lading clause. Cargo had vigorously argued in *The Jason* that:

> The Harter Act confers no right to contract for such right, and indeed confers no right to contract for any exemption. The act itself

> gives and measures the exemption and no right to contract for any further exemption or privilege exists. [225 U.S. at 45].

Referring to the *Jason* clause, this Court said in *May* v. *Hamburg-Amerikanische Etc.,* 290 U.S. 333, 343:

> To create that obligation [to contribute to general average] there was need of an agreement. For a time there was doubt whether such an agreement, if made, would be consistent with public policy. The doubt was dispelled by the decision in *The Jason, supra.*

To the same effect see *Aktieselskabet Cuzco* v. *The Sucarseco,* 294 U.S. 394, 402.

Respondents persuaded the Court of Appeals that *The Jason* was distinguishable on the ground that the *Jason* clause "is not to be approached as a restriction of the rights of cargo as our present agreement so clearly is" (R. 147).[23] But this was not the ground on which the *Jason* clause was sustained. In *The Jason* the clause was viewed by all parties and the Court as a restriction on cargo's rights. For this reason, cargo there strenuously

---

[23] The Court of Appeals in part supported its position by reference to this Court's language in *Aktieselskabet Cuzco* v. *The Sucarseco,* 294 U.S. 394, 403, which said that the effect of the *Jason* clause was to authorize the master "to act directly for cargo in relation to cargo's duty to contribute in general average." This characterization of the clause, made in answer to an argument by the non-carrying vessel that it should not be liable for the amounts contributed by cargo to general average under a *Jason* clause, was plainly not intended to suggest that as between carrier and cargo the *Jason* clause did not impose a new duty.

resisted it on substantially the same grounds that are urged here (see pp. 36-37, *supra*). It was sustained, not because it left cargo's rights undiminished, but "because it admitted the shipowner to share in general average only in circumstances where by the Harter Act he was relieved from responsibility." *Aktieselskabet Cuzco* v. *The Sucarseco*, 294 U.S. 394, 403.

The suggestion of the court below that all provisions "limiting the shipper's rights" (R. 147) are invalid unless specifically authorized by statute is thus plainly contrary to this Court's decision in *The Jason*. It is contrary also to numerous other decisions of this and other federal courts, sustaining and enforcing bill of lading provisions for which there was no express statutory warrant. Among clauses which have been upheld are those limiting the carrier's liability, even for negligence, to a stipulated amount, *Reid* v. *Fargo*, 241 U.S. 544; providing that freight shall be deemed earned, ship and/or cargo lost or not lost, *Allanwilde Transport Corp.* v. *Vacuum Oil Co.*, 248 U.S. 377; limiting the time within which suit must be brought, *K. Ikuno* v. *Morris & Co.*, 22 F. 140 (C.A. 4), certiorari denied, 276 U.S. 626; *Switzerland General Ins. Co.* v. *Navigazione Libera Triestina*, 91 F. 2d 960 (C.A. 2); requiring notice of claim within a prescribed time as a prerequisite to any suit, *Bank of California* v. *International Mercantile Marine Co.*, 64 F. 2d 97 (C.A. 2), certiorari denied, 290 U.S. 649; *The St. Hubert*, 107 Fed. 727 (C.A. 3),

certiorari denied, 181 U.S. 621; relieving the carrier from liability for unseaworthiness or defects of machinery not discoverable by due diligence, *The Prussia,* 93 Fed. 837 (C.A. 2), certiorari denied, 174 U.S. 803; *The Floridian,* 83 F. 2d 949 (C.A. 2), certiorari denied, 299 U.S. 577; *cf. The Carib Prince,* 170 U.S. 655. All of these clauses plainly limited the shipper's preexisting rights, with no possible benefit to the shipper except as the freight rate might be affected, yet all were sustained.

The argument of the Court of Appeals from public policy thus disregards both the applicable federal legislation and the decisions of this Court implementing that legislation. Congress has twice declared, by Section 3 of the Harter Act and Section 4(2) of the Carriage of Goods by Sea Act, that carriers by sea are not to be chargeable by their cargo with responsibility for acts of negligent navigation. That declaration would seem *ipso facto* to establish the reasonableness of clauses which, as the "Both-to-Blame" clause, do no more than make effective the limitation. *Cf. Chicago B. & Q. R. Co.* v. *McGuire,* 219 U.S. 549. As Judge Medina said in the District Court (R. 113):

> the statutes express a legislative policy that carriers should not and that cargo owners should bear the risk of damage to cargo due to the carrier's negligent navigation by its servants. I do not see how I can invalidate the contractual provision by asserting a directly contrary policy to be controlling.

C. *The "Both-to-Blame" clause is a reasonable means of implementing the congressional policy of relieving the carrier from liability to its cargo for errors and faults of navigation.*

The court below, in addition to its arguments from public policy discussed above, seems to have deemed the "Both-to-Blame" clause unreasonable or otherwise objectionable because, in its view, that clause introduced uncertainties into the applicable law, and upset the general scheme of rights among parties to a collision established by *The Chattahoochee,* 173 U.S. 540, and *The Atlas,* 93 U.S. 302 (*supra,* pp. 11-14). As we have stated above (*supra,* p. 8), we do not believe the issue before the Court is whether, apart from contract, the result brought about by the "Both-to-Blame" clause could or should be reached by judicial decision. But, in any event, we think the court's practical objections to the result produced by the clause are without merit and rest on misconceptions. Not only does the clause not have the defects which the court attributed to it, but it has, we believe, the distinct merit of avoiding an obvious anomaly and of implementing and making effective the policy adopted by Congress.

The "Both-to-Blame" clause introduced no new uncertainties in the enforcement of cargo's rights (Cf. R. 138). The problems of enforcement by cargo are the same whether a "Both-to-Blame"

clause is involved or not. The difficulty of obtaining jurisdiction over all necessary parties exists in any event. Cargo must always face the problem of selecting a forum in which to proceed against the non-carrier. And any uncertainty arising from the necessity for the non-carrier to get jurisdiction over the carrier can only redound to the benefit of cargo since the only result of a failure to obtain jurisdiction over the carrier would be that the "Both-to-Blame" clause never becomes effective.

Similarly, complications which might arise from the assertion by either vessel of its right to limit liability can have no bearing on the reasonableness of the clause. Limitation of liability by either vessel might reduce or nullify the carrier's indirect liability for cargo damage, thereby mitigating or removing cargo's obligations under the clause. In no event could cargo's obligations under the clause be increased by limitation.

Nor does the "Both-to-Blame" clause affect the principles laid down in *The Chattahoochee, supra,* and *The Atlas, supra* (cf. R. 139). In considering respondent's contentions in this respect, it may be helpful to regard the mutual relationships of a carrier, its cargo, and the non-carrying vessel in a "Both-to-Blame" collision as forming three legs of a triangle. *The Chattahoochee* dealt with one leg—the relationship of the carrying vessel to the non-carrying vessel. The non-carrying vessel there was permitted to include the amount it had paid as damages to the cargo of the carrying vessel

in its collision damages, and to recover half of that amount from the carrier, notwithstanding the immunity given the carrier by Section 3 of the Harter Act. In so holding, the Court emphasized that it was concerned only with the relationship of "two colliding vessels to each other" (173 U.S. at 555), and that the Harter Act did not affect that relationship. The "Both-to-Blame" clause also does not affect that relationship.[24]

The second leg of the triangle is dealt with by *The Atlas*. That case was concerned only with the relationship of cargo to the non-carrying vessel; it held that where the non-carrier was at fault cargo could recover 100% of its damage from it. That relationship also is not affected by the statutes or by the "Both-to-Blame" clause. Regardless of the existence of such a clause, cargo recovers 100% of its damage from the non-carrying vessel. To the extent that the ultimate burden of that recovery remains on the non-carrier, cargo retains the benefit of the recovery. The "Both-to-Blame" clause comes into play only to the extent that the non-carrier is able to shift the burden of cargo loss to the carrier.

The third leg of the triangle is dealt with in the present case. It concerns solely the relationship between a carrier and its cargo, a relationship with which this Court was not concerned in either *The*

---

[24] It was stipulated below, in recognition of the *Chattahoochee* rule, that the "Esso Belgium's" damages, for a portion of which the "Nathaniel Bacon" is liable, include the amount paid by it to the "Nathaniel Bacon's" cargo.

Atlas or the *Chattahoochee*. It is to this relationship that the Harter Act and the Carriage of Goods by Sea Act apply, and as between these parties they place the risk of cargo damage caused by errors of navigation on the cargo owner. The bill of lading, as a contract between cargo and carrier, affects these parties only. A bill of lading clause is therefore the appropriate method of ensuring that, as between these parties, the statutory principles for distribution of loss shall not be upset by the operation of rules not directed to this relationship. The "Both-to-Blame" clause does not purport to and could not affect the relationship of either the carrier or its cargo to the non-carrying vessel. So far as the rights and liabilities of the non-carrying vessel are concerned, it is immaterial whether the carrier's bill of lading contains a "Both-to-Blame" clause or not.

As between a carrier and its cargo, there can be no doubt that the indirect result of the rules of *The Chattahoochee* and *The Atlas*, in those cases in which they are both applicable, is anomalous. However sound those rules may be as they affect the relationships which they are intended to govern, their indirect effect on a relationship with which neither is concerned produces a result which should, if possible, be avoided. Without a "Both-to-Blame" clause the carrier bears the ultimate burden of half of his own cargo's loss, although his only fault is that of error in navigation for which Congress has said he shall not be liable to his cargo.

Respondents sought in the court below to becloud the realities of the situation by semantic manipulation, characterizing the damages payable by the carrier to the non-carrier as purely "collision" rather than "cargo" damages. That these may be regarded as collision damages as between the two vessels is irrelevant. This Court has held that as between a carrier and underwriters subrogated to its cargo's rights, the right of cargo to recover its damages from the carrier, whether asserted directly or indirectly via the non-carrier, is within the coverage of insurance protecting the carrier against liability for "loss or damage to cargo." *Great Lakes Transit Corp.* v. *Interstate S. S. Corp.*, 301 U.S. 646, 650. In so holding it rejected arguments comparable to those here advanced by cargo with the statement that "The procedure in admiralty did not affect the substantive rights established by the policies." (p. 655). By similar reasoning, arguments from procedural incidents should not be allowed, here, to obscure substantive results or to obstruct the full operation of the legislative policy. The plain fact is that respondents would require a carrier to bear half of the damages incurred by its cargo where both vessels are at fault, although if it had been solely at fault it would have been completely exonerated by statute from liability for damages to its cargo. A provision designed to eliminate this result implements, and does not conflict with, the statutory policy. It is in this light that the reasonableness of the provision must be judged.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and the judgment of the District Court reinstated.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
HOLMES BALDRIDGE,
Assistant Attorney General.
JAMES L. MORRISON,
Special Assistant to the Attorney General
SAMUEL D. SLADE,
ARTHUR W. MURPHY,
Attorneys.

BURLINGHAM, VEEDER, CLARK & HUPPER,
ROSCOE H. HUPPER,
RAY ROOD ALLEN,
BENJAMIN E. HALLER,
Of Counsel.

FEBRUARY 1952.

APPENDIX

The pertinent portions of Sections 1-4 of the Harter Act (Act of February 13, 1893, 27 Stat. 445, 46 U. S. C. 190-193) provide as follows:

SEC. 1. It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same,

shall in any wise be lessened, weakened, or avoided.

SEC. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

SEC. 4. That it shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or

property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described.

2. Sections 3 and 4 of the Carriage of Goods by Sea Act of 1936 (Act of April 16, 1936, 49 Stat. 1207, 1208-10, 46 U. S. C. 1301, 1303, 1304) provide as follows:

SEC. 3 (1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided

such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods: *Provided,* That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3) (a), (b), and (c), of this section: *Provided,* That nothing in this Act shall be construed as repealing or limiting the application of any part of the Act, as amended, entitled "An Act relating to bills of lading in interstate and foreign commerce", approved August 29, 1916 (U. S. C., title 49, secs. 81-124), commonly known as the "Pomerene Bills of Lading Act."

(5) The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quan-

tity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

(6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: *Provided,* That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact

shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

(7) After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading: *Provided*, That if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a "shipped" bill of lading.

(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

SEC. 4. (1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 3. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided,* That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

(3) The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

(4) Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this Act or of the contract of carriage, and the carrier shall not be

liable for any loss or damage resulting therefrom: *Provided, however,* That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided,* That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

(6) Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the

carrier, master or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1933 000000 ???